SUPREME COURT, U. S.

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No. 314

# In the Supreme Court of the United States

OCTOBER TERM, 1969

FLORENCE M. BARNES AND BARNES THEATRE TICKET SERVICE, INC., PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
JOHNNIE M. WALTERS,
*Assistant Attorney General,*
WILLIAM A. FRIEDLANDER,
STEPHEN H. HUTZELMAN,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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### OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court (R. 151–167;[1] Pet. App. 1–16) are not officially reported. The opinion of the court of appeals (Pet. App. 21–35) is reported at 408 F. 2d 65.

### JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969. A petition for rehearing en banc was denied on April 10, 1969 (Pet. App. 36). The petition for a writ of certiorari was filed on July 5,

[1] "R." refers to the appendix to petitioners' brief in the court of appeals. "Supp. R." refers to the appendix to respondent's brief in the court of appeals.



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1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the application of the usual presumption of correctness to a federal tax deficiency notice constituted a denial of due process where the notice failed to state with particularity how the deficiency had been computed and the taxpayers failed to establish either that the Commissioner's determination was erroneous or that their books and records adequately reflected income.

## STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 6212. NOTICE OF DEFICIENCY.
>
> (a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1665-1666]. *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.
>
> * * * * *
>
> [26 U.S.C. 6212.]

## STATEMENT

Petitioner Florence M. Barnes (Florence) has been president and sole shareholder of petitioner Barnes Theatre Ticket Service, Inc., of Chicago, Illinois (Barnes), since its incorporation in 1947. Barnes is a "ticket broker" which resells tickets of admission to theatres and other places of amusement at charges greater than box office prices. (Pet. App. 3-4.)

The Commissioner determined that payments by Barnes to Florence in 1958 were dividends and that Barnes understated its gross income from sales to other brokers for 1955 through 1958. The Tax Court ruled in favor of petitioners on these issues. (Pet. App. 11–16.) The Commissioner also determined that Barnes did not adequately substantiate its costs of operation. He disallowed a portion of the cost of tickets sold claimed by Barnes but did not state the manner in which the deficiency had been computed in his deficiency notice. (Pet. App. 6–7; R. 23.) [2] At trial, petitioners failed to show either that the asserted deficiency was computed in an improper manner or that their books and records adequately reflected the cost of tickets sold. The Tax Court accordingly held that petitioners had failed to overcome the presumption of correctness normally attaching to the Commissioner's determination and sustained that determination. (Pet. App. 7–12.) The court of appeals affirmed. (Pet. App. 21–31.)

## ARGUMENT

The decision below, affirming that of the Tax Court with respect to Barnes' overstatement of its cost of

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[2] The Tax Court also found (Pet. App. 15–16) that, growing out of its holding of Barnes' overstated cost of sales and consequent understatment of taxable income, Florence received additional dividend income during the years 1955 through 1958 as distributions from Barnes. Petitioners introduced no evidence to refute the Commissioner's determination in this regard and instead attempted to prove the determination as to Barnes in error. The Tax Court held that Florence failed to overcome the presumption of correctness in favor of the determination and the Court of Appeals affirmed. (Pet. App. 31.)

tickets sold, is correct, and there is no conflict of decisions or other occasion for further review.

1. In lieu of an effort to overcome the presumption of correctness attaching to the Commissioner's determination, petitioners claim they were denied due process because the statutory notice of deficiency did not state the manner in which the deficiency had been computed. They further claim they were denied due process because the presumption of correctness procedurally required them to go forward with the evidence to show that the Commissioner's determination was erroneous or that their books and records properly reflected the cost of tickets sold. Neither of these contentions has merit.

Section 6212(a) of the Internal Revenue Code of 1954, *supra*, p. 2, requires no special form for a statutory notice of deficiency. *Commissioner* v. *Forest Glen C. Co.*, 98 F. 2d 968, 971 (C.A. 7). So long as the notice advises the person who is to pay of the amount of the deficiency proposed, it is valid and sufficient to raise the presumption of correctness and to place the burden of proof on the taxpayer. *Commissioner* v. *Stewart*, 186 F. 2d 239 (C.A. 6); *Olsen* v. *Helvering*, 88 F. 2d 650 (C.A. 2). No contrary authority is cited and no such authority exists.

Petitioners were not prejudiced by the form of the deficiency notice. As the court of appeals recognized (Pet. App. 27), petitioners' ability to settle many issues before trial (R. 29–31) and to prevail on two major issues at trial (Pet. App. 11–16), as well as the analysis of the issues reflected in their petition and opening statement to the Tax Court (R. 19; Supp.

R. 4–5), indicate a complete awareness of the various questions involved.[3]

Nor were petitioners prejudiced because the burden of going forward with the evidence was imposed upon them. Petitioners had every opportunity to rebut the presumption of correctness attaching to the Commissioner's determination by presenting competent and credible evidence to the trier of fact on the basis of which the trier could find facts inconsistent with the Commissioner's determination. This could be done by showing that the Commissioner's determination was erroneous or that their books and records adequately reflected income, or by a combination of such evidence. (Pet. App. 28.) The Tax Court held (Pet. App. 9) that petitioners adduced no evidence as to the manner in which the Commissioner computed the deficiency.

Petitioners sought to establish the required inconsistent facts by offering corporate books and records as purported evidence that the claimed costs of tickets sold were correct. The books and records, however, contained only summary figures as to ticket costs, and the underlying original documents had been destroyed

[3] With respect to the matter of due process, petitioners do not claim that they were not well aware, by the time of trial, of the fact that their records as to ticket purchase costs were in issue and of how the Commissioner had recomputed those costs. In his opening statement before the Tax Court (Supp. R. 4), counsel for taxpayers, Mr. Crowley, acknowledged awareness that "the prime issue is a disallowance of a portion of the cost of goods sold for alleged lack of substantiation." Moreover, if petitioners felt that they were handicapped by the form of notice, they had the opportunity under Rule 17(c), Rules of Practice, Tax Court of the United States (Rev. 1958, 1968 ed.) to file a motion for a more definite statement. This they failed to do.

(R. 155), thus making it impossible to verify the claimed ticket costs. In addition, the Tax Court considered statements by Florence, in the nature of admissions, that the books and records did not reflect the true cost of tickets and that entries so labeled actually included other types of expenditures (Pet. App. 10–11; Supp. R. 11–23). On this record, the Tax Court concluded (Pet. App. 11–12) that petitioners' books and records were unreliable and were not, therefore, competent to overcome the Commissioner's determination.

It follows that there was no deprivation of due process by reason of the imposition of the burden of proof. Petitioners were unable to overcome the presumption of correctness solely because of their own failure to keep adequate books and records of ticket costs as required by Section 6001 of the 1954 Code. They attempt here, as they attempted below, to take advantage of their own default and of evidentiary gaps resulting from the lack of proper records. Since the Tax Court found, however, that petitioners' books and records were unreliable, and since this finding is not clearly erroneous, there is no basis for further review of the court of appeals' affirmance of the Tax Court decision. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291.

2. The decision below is not in conflict with *Helvering* v. *Taylor*, 293 U.S. 507. *Taylor* held that the Commissioner's determination will not be sustained where it is "shown" (293 U.S. 514) that the determination is arbitrary and excessive. As we have demonstrated, no such showing was made here. Moreover, both the

Tax Court and the court of appeals carefully noted, in accordance with the rule of the *Taylor* case (Pet. App. 9, 28), that petitioners were not required to prove the correct amount of tax liability or that there was no such liability. Contrary to petitioners' assertion, therefore, the court of appeals' decision is completely consistent with the holding in *Taylor* and does not sanction an arbitrary determination by the Commissioner.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
JOHNNIE M. WALTERS,
*Assistant Attorney General.*
WILLIAM A. FRIEDLANDER,
STEPHEN H. HUTZELMAN,
*Attorneys.*

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